Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DA 08-1913
	)	
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance.	)	WT Docket No. 08-165

Reply Comments on behalf of the Cable and Telecommunications Committee of the New Orleans City Council

The Cable and Telecommunications Committee of the New Orleans City Council, through its undersigned counsel, submits these Reply Comments in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on August 14, 2008.

In this proceeding, the FCC is considering whether to create a new set of rules for antenna and tower site approvals. The proposed rules provide that if the local government fails to render a final decision by a certain deadline (generally 45 days or 75 days from the date of the tower siting request), then a tower or antenna site would be automatically deemed approved. Furthermore, the proposed rules would preempt local zoning ordinances that require wireless providers to obtain variances, such as waivers to setback requirements.

The Cable and Telecommunications Committee of the New Orleans City Council opposes the CTIA's Petition for Declaratory Ruling.

Statement of Interest

The Cable and Telecommunications Committee of the New Orleans City Council oversees the City Council's regulatory authority over cable and telecommunication matters and makes recommendations to the full City Council concerning regulations and services. The City of New Orleans' Comprehensive Zoning Ordinance plays an integral role with respect to cable and telecommunication facilities, as the ordinance regulates the placement, type, and size of various telecommunication structures. The Committee has a compelling interest in zoning ordinances, as they relate to cable and telecommunication facilities. In particular, the Committee makes recommendations with respect to zoning ordinances to help promote the distribution and deployment of cable and telecommunication facilities, while fully protecting the health, safety and welfare of the City of New Orleans and its citizens.

Preliminary Statement

Congress enacted the Telecommunications Act of 1996 to promote competition and higher quality in American telecommunications services and to encourage the rapid deployment of new telecommunications technologies. CTIA asserts that one of the means by which Congress sought to accomplish these goals was to reduce the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna and towers.[1]

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[1] *City of Rancho Palos Verdes, Cal. v. Abrams,* 544 U.S. 113, 115-116, 125 S.Ct. 1453, 1455 - 1456 (U.S.,2005).

To reduce these impediments, Congress enacted 47 U.S.C. § 332(c)(7), which imposes specific limitations on the authority of state and local governments to regulate the location, construction, and modification of such facilities. Under this provision, local governments may not:

- unreasonably discriminate among providers of functionally equivalent services,
- take actions that prohibit or have the effect of prohibiting the provision of personal wireless services,
- limit the placement of wireless facilities on the basis of the environmental effects of radio frequency emissions.

Further, local government must act on requests for authorization to locate wireless facilities "within a reasonable period of time," and each decision denying such a request must be in writing and supported by substantial evidence contained in a written record. Further, any person adversely affected by any final action or failure to act by a State or local government may commence an action in any court of competent jurisdiction.[2]

Congress, however, also specifically preserved the authority of local zoning boards over decisions regarding the placement, construction, and modification of personal wireless service facilities. The Act does not abolish all local authority. "It tries to balance its goals with the preservation of some local authority over land use. Put simply, the [Act] attempts to reconcile the interests of consumers and residents (many of whom are themselves cell phone users)."[3] Section § 332(c)(7) "is a deliberate compromise between two competing

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[2] *City of Rancho Palos Verdes, Cal. v. Abrams,* 544 U.S. 113, 115-116, 125 S.Ct. 1453, 1455 - 1456 (U.S.,2005).

[3] *Verizon Wireless (VAW) LLC v. Douglas County, Kan. Bd. of County Com'rs,* 544 F.Supp.2d 1218, 1241 (D.Kan.,2008).

aims—to facilitate nationally the growth of wireless telephone service and to maintain substantial local control over siting of towers."[4]

Congress decided how best to reduce the impediments imposed by local governments, and the rules proposed by CTIA conflict with those limitations imposed by Congress and are contrary to the local zoning authority preserved by Congress.

Generally, two arguments in opposition to the Petition for Declaratory Ruling have emerged in the Comments that have been filed in this proceeding, namely a Legal Argument and a Practical Argument.

- **The Legal Argument.**

The Opposition has shown that the Federal Communications Commission legally cannot grant the relief requested because Congress preserved local zoning authority, and also because Congress did not intend for FCC rules to preempt local zoning laws, except with respect to radio-frequency emissions. Accordingly, the relief requested by CTIA cannot be granted because to do so would be contrary to Congress' intent and beyond the authority of the FCC.

- **The Practical Argument.**

Even if the FCC had the authority to preempt local zoning laws, the one-size-fits-all approach proposed by CTIA will not work as a practical matter because each tower siting request is uniquely different. The specific facts and circumstances surrounding the review process of each tower siting request must be independently examined for reasonableness.

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[4] *Town of Amherst v. Omnipoint Communications Enters., Inc.*, 173 F.3d 9, 13 (1st Cir.1999).

Also, imposing specific deadlines will cause local government to hastily make uniformed, premature decisions. Under pressure to beat the clock, local government may mistakenly deny construction for a safe tower or mistakenly approve construction for an unsafe tower.

The Legal Argument

As discussed below, FCC does not have the legal authority to grant the relief requested in CTIA's Petition.

1. *Alliance for Community Media v. F.C.C.* is not controlling.

The Supporters' of the Petition primarily rely upon on *Alliance for Community Media v. F.C.C.*, 529 F.3d 763, 776-77 (6th Cir. 2008) for its contention that the FCC has authority to establish specific time-limits with respect to tower siting requests. For the reasons stated, herein *Alliance for Community Media v. F.C.C.* is distinguishable and not controlling.

In *Alliance for Community Media,* the Sixth Circuit upheld the FCC's authority to establish specific time-limits for local cable franchising authorities to act upon cable franchise applications. The FCC's rule arose from its interpretation of the following provision of the Telecommunications Act:

> A franchising authority . . . may not unreasonably refuse to award an additional competitive franchise.[5]

[5] 47 U.S.C. § 541(a)(1).

To satisfy 47 U.S.C. § 541(a)(1)'s requirement of reasonableness, the FCC ordered that local franchising authorities must act on initial franchise applications within 90 days for entities with existing facilities in the right-of-way and within 180 days for all other applicants. The Sixth Circuit said that "the absence of a statutory deadline in [47 U.S.C. § 541(a)(1)] leads us to conclude that Congress authorized, but did not require, the FCC to impose time limits on the issuance of new franchises."[6]

The Sixth Circuit based its decision upon *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In reviewing an agency's interpretation of a statute, the courts apply the two-step process announced by the Supreme Court in *Chevron U.S.A., Inc.*, which is explained below.

Step 1: Did Congress speak directly to the precise question at issue by employing precise, unambiguous statutory language?[7] If the text of the statute is unambiguous and, therefore, the intent of Congress is clear, that is the end of the matter for the court, as well as the agency.[8]

Step 2: If Congress has not directly addressed the precise question at issue, that is, the statute is silent or ambiguous on the specific issue, did the agency base its rule on a permissible construction of the statute?[9]

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[6] *Alliance for Community Media v. F.C.C.*, 529 F.3d 763, 780 (6th Cir. 2008).

[7] *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778.

[8] *Chevron*, 467 U.S. at 842-43, 104 S.Ct. 2778.

[9] *Battle Creek Health Sys. v. Leavitt*, 498 F.3d 401, 408-09 (6th Cir.2007).

In sum, *Chevron* requires a federal court to defer to an agency's reasonable interpretation of any ambiguities in a statute which it administers. In *Alliance for Community Media,* the Sixth Circuit held that the particular statute was ambiguous due to the absence of a statutory deadline, which led the Court to conclude that Congress authorized the FCC to impose time limits on the issuance of new franchises.[10]

Using the *Chevron* analysis, in our case, the FCC does not have the authority to establish specific time-limits with respect to tower siting requests for the following reasons:[11]

(1) Congress did not entrust the FCC to administer local zoning issues because local zoning authority was preserved;[12]

(2) Congress did not intend for the FCC to usurp the local zoning authority because Congress did not authorize preemption of local zoning laws, except in very narrow circumstances;

(3) Congress did not intend to impose specific deadlines upon the local zoning authorities. Recognizing that each tower siting request is different, Congress allowed local government the right to act on the request within a reasonable period of time, taking into account the nature and scope of such request.

(4) Congress directly, precisely and unambiguously imposed a statutory deadline to act upon tower siting requests, *i.e.*, "within a reasonable period of time . . . taking into account the nature and scope of such request."[13]

Under the *Chevron* analysis, it would be impermissible for the FCC to grant CTIA's Petition. The above reasons are discussed in more detail below.

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[10] *Alliance for Community Media v. F.C.C.*, 529 F.3d 763, 780 (6th Cir. 2008).

[11] See also *Comments of the County of Albemarle, Virginia*, filed in this proceeding.

[12] 47 U.S.C. § 332(c)(7).

[13] 47 U.S.C. § 332(7)(B)(ii).

2. Congress intended to preserve local zoning authority and did not intend to preempt local zoning authority.

The FCC cannot establish tower siting rules that would have the effect of preempting local zoning laws because Congress did not give the FCC such authority. Rather, Congress preserved local zoning authority.[14] In particular, 47 U.S.C. § 332(c)(7) provides in part that:

> [N]othing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[15]

Thus, the FCC does not administer 47 U.S.C. § 332(c)(7). Instead, Congress specifically wanted local government to retain the right to determine how and where towers should be placed. Any action by the FCC to intrude on the local decision-making process runs contrary to Congress' intent.

Furthermore, unless preemption was the clear and manifest intent of Congress, local zoning laws may not be preempted.[16] Congress did not intend for local zoning laws to be preempted by federal law, except with respect to radio-frequency emissions. In fact, when considering this legislation, the Congress' decided against federal preemption, instead opting to "preserve the authority of State and local governments over zoning and land use matters except in limited circumstances."[17]

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[14] 47 U.S.C. § 151 *et seq.*

[15] 47 U.S.C. § 332(c)(7)(A).

[16] *Gregory v. Aschcroft*, 501 U.S. 452, 460-461 (1991).

[17] See H.R. Conf. Rep. No. 104-458, at 207-08 (1996);see *St. Croix County,* 342 F.3d at 828-829.

Accordingly, Congress intended to preserve local zoning authority and did not intend to preempt local zoning laws. Congress did not intend for the FCC to usurp the local zoning authority, and therefore, the FCC has no authority to act in this particular case.

More importantly, Congress did not want the FCC to develop a uniform policy for the siting of wireless tower sites, but rather, Congress wanted the courts to have exclusive jurisdiction over all disputes regarding the placement, construction, and modification of personal wireless service facilities. Specifically, the legislative history provides that:

> It is the intent of the conferees that other than under Section 332(c)(7)(B)(iv) [regarding the effects of radio frequency emissions]. . . the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of [commercial mobile services] facilities shall be terminated.[18]

In fact, even the FCC, itself, has recognized that the courts have exclusive jurisdiction over zoning disputes (except in radio-frequency emissions cases) and that "the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation."[19]

The relief sought by CTIA in its Petition for Declaratory Ruling would alter the local process and procedure for approving a tower siting request and is therefore contrary to Congress' intent and prohibited by the Telecommunications Act—*i.e.,* the Telecommunications Act shall not modify, impair or supersede local law "unless expressly stated in such Act."[20] Accordingly, the Act does not expressly state that the FCC may

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[18] See H.R. Conf. Rep. No. 104-458, at 208 (1996).

[19] This information comes directly from the FCC's website. See http://wireless.fcc.gov/siting/local-state-gov.html

[20] 47 U.S.C. § 601(c)(1).

modify, impair or supersede local zoning law, but instead, the Act expressly preserved local zoning authority.

Therefore, as a matter of law:

(1) The FCC cannot impose specific deadlines in which to act on a tower siting request;

(2) The FCC cannot preempt local zoning ordinances that require wireless providers to obtain variances; and

(3) The FCC cannot adopt a rule that would bar local government from making zoning decisions that have the effect of prohibiting a specific provider from providing service in a given location on the basis of another provider's presence there.

3. "A reasonable period of time" is not ambiguous but is consistent with the preservation of local zoning authority.

The Telecommunications Act provides that a local zoning authority must act on any request for authorization to place, construct, or modify personal wireless service facilities "within a reasonable period of time."[21] Specifically Section 332(7)(B)(ii) provides:

> A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities *within a reasonable period of time* after the request is duly filed with such government or instrumentality, *taking into account the nature and scope of such request.*[22]

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[21] 47 U.S.C. § 332(7)(B)(ii).

[22] Emphasis added.

CTIA contends that "a reasonable period of time" is ambiguous and that the FCC should impose specific deadlines upon local government.

To eliminate this alleged ambiguity, which CTIA contends exists in the Telecommunications Act, CTIA asks the FCC to re-write the Act to provide that the local government must act within 45 or 75 days, as opposed to acting "within a reasonable period of time."

Congress, however, did not intend to impose uniform, specific deadlines upon the local zoning authorities. Rather, Congress recognized that each tower siting request is different. The Act even provides that the local government shall act on the request in a reasonable period of time "*taking into account the nature and scope of such request*." That is, Congress realized that establishing a uniform, strict deadline for local government to act upon a tower siting request would not be practical because the nature and the scope of each request are uniquely different. In view of the particular circumstances, 45 days to approve a specific tower siting request may be reasonable for one particular situation, but unreasonable for another.

Therefore, each situation must be independently examined when determining whether a local authority rendered a decision in reasonable amount of time, taking into account the nature and scope of such request.[23] Because each situation must be reviewed on a case-by-case basis, the "reasonableness time" standard is appropriate.

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[23] *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus,* 24 F.Supp.2d 359 (D.N.J.1998).

Recognizing the need for flexibility associated with tower siting requests, Congress preserved the local government' authority to act "within a reasonable period of time." Thus, any bright-line rule (requiring local government to act within 45 or 75 days) would be contrary to Congress' intent.

In addition, enacting the proposed deadlines has the effect of giving preferential treatment to telecommunication providers. That is, tower siting applications will be expedited or fast-tracked and acted upon ahead of other zoning applicants. Local zoning ordinances may seem burdensome to telecommunications providers, but it is no greater a hurdle than that faced by all other businesses who are applying to build in any given city or town. A wireless provider should not be treated more favorably than any other zoning-permit applicant.

4. Congress intended for the Courts to determine whether a local decision has the effect of prohibiting the provision of personal wireless services.

CTIA asks the FCC to establish a rule that local government may not deny a provider's tower siting request based another provider's presence in the area to be served. Congress, however, exclusively intended for the courts to determine whether the request was properly denied.[24]

Thus, if the FCC enacts a rule that limits a local government's ability to deny a siting request, then such a rule conflicts with the Telecommunications Act because:

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[24] 47 U.S.C. § 332(c)(7)(B)(iv).

(1) Congress preserved local zoning authority, and therefore, the FCC cannot enact rules and decisions that effectively preempt or re-write local zoning laws;[25]

(2) Congress gave the courts exclusive jurisdiction to resolve disputes arising from the denial of a tower siting application;[26] and

(3) Congress intended for a denial of a request to be upheld, if the denial was supported with substantial evidence.[27]

Again, realizing that each situation is unique, Congress intended for the Courts to determine these issues, and Congress further permitted the local government to deny a request, if supported with substantial evidence.

Section 332(c)(7)(b)(iii) provides:

> Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Thus, any FCC rule attempting to re-write the Telecommunications Act and mandating how and when local governments may deny a provider's tower siting request is contrary to the intent of Congress.

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[25] 47 U.S.C. § 332(c)(7)(A).

[26] 47 U.S.C. § 332(c)(7)(B)(iv).

[27] 47 U.S.C. § 332(c)(7)(b)(iii)

5. Preempting variances is contrary to Congress' intent.

CTIA argues that a variance application has the effect of prohibiting wireless service in violation of Section 332(c)(7)(B)(i)(II) of the Telecommunications Act. Thus, CTIA argues that the requirement to obtain a variance *per se* is prohibited under the Act.

Congress, however, approved the use of variances. The legislative history, as stated in the Conference Committee Report, provides:

> If a request for placement of a personal wireless service facility involves a zoning *variance* or a public hearing or comment process, the time for rendering a decision will be the usual period under such circumstances.[28]

Obviously, Congress recognized the need and use of variances. Variances play an important role when attempting to balance public safety, health, and aesthetics concerns with the deployment of telecommunication services. Incidently, it makes no sense that that CTIA would want to ban the use of variances. Variances allow applicants to actually bypass regulations and to permit nonconforming use of zoned property. Variances help to promote the deployment of telecommunication services.

Essentially, CTIA wants the FCC to prohibit local government from establishing setback requirements or other such regulations so that wireless providers do not have to apply for a variance. However, any rule declaring that local government may not impose setback requirements for tower placement conflicts with the local zoning authority that Congress preserved. Congress intended for the local government to determine whether setback requirements are necessary. Thus, such a rule—*i.e.,* an applicant shall not be required to

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[28] See H.R. Conf. Rep. No. 104-458, at 208 (1996).

obtain a variance—conflicts with the intent of Congress.

CTIA basically contends that a local zoning ordinance that requires the applicant to obtain a variance—on its face—has the effect of prohibiting telecommunications service. However, the U.S. Court of Appeals for the Ninth Circuit recently rejected such an argument and unanimously held *en banc* that the applicant must show that the zoning ordinance *actually* or *effectively* prohibits telecommunication service—as opposed to showing that the ordinance has the mere possibility of prohibiting telecommunication service.[29] Accordingly, CTIA cannot show that every variance (or setback requirement) either actually or effectively prohibits the provision of telecommunications services. In fact, a "one-size-fits-all approach" does not work with respect to tower siting, *i.e.,* what may an unreasonable setback requirement for one location may be completely reasonable for another. Each situation is different.

The Practical Argument

As shown above, Congress did not give the FCC authority to preempt local zoning laws, but even if the FCC had the authority to act, the one-size-fits-all approach proposed by CTIA will not work as a practical matter. As discussed below, there are practical reasons that weigh against granting CTIA's Petition.

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[29] *Sprint Telephony PCS v. County of San Diego*, 2008 U.S. App. LEXIS 10421 (9th Cir. 2008).

1. A "one-size-fits-all approach" does not work with respect to tower siting.

Establishing deadlines or prohibiting variances is simply not practical. Each situation is different, which is why Congress preserved local zoning authority and provided that local government must act within a *reasonable* time on a request *taking into account the nature and scope of such request*. Rules regulating the placement of towers must provide sufficient flexibility so that local zoning authority, wireless providers and citizens can adapt to individual circumstances. Simply stated, a 45-day deadline to act upon a tower siting request may be reasonable in one situation but completely unreasonable in another. As stated earlier, each situation is different, and therefore, Congress tasked the courts to determine (on a case-by-case basis) whether the local zoning authority acted within a reasonable period of time.

2. "Shot clock" rules encourage delays by the applicants.[30]

The proposed rules encourage the applicant to employ dilatory tactics to delay the approval process. The applicant may submit an incomplete applications or fail to cooperate with the local zoning authority in order to run out the clock. In other words, if the applicant holds the ball too long, then the applicant may be rewarded with automatic site approval.

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[30] The proposed deadlines have commonly been referred to as a "shot clock." In basketball, the shot clock penalizes the team who holds the ball too long without attempting to make a basket.

3. 45 or 75 days is not sufficient time to approve a request.

The proposed deadlines do not provide sufficient time for local zoning authorities to properly act on the request. For example: Zoning applications must be published in the newspapers. An exhaustive review process must take place involving several layers of review, including the City Council, the planning commissions, zoning boards, and sometimes historic commissions. Concerned citizens may want to respond. Alternative sites must be studied, and so forth.

Also, given that most city councils, planning commissions and zoning boards hold only one meeting per month, the review process and the calendar would make it difficult for the municipality (and related boards and commissions) to meet the proposed deadlines.

Furthermore, some delays are beyond the control of the local government, such as incomplete applications that do provide sufficient information to enable an informed decision within the 45 or 75 day time period.

Given the numerous variables involved with respect to reviewing and approving a tower siting request, Congress wisely opted against imposing specific deadlines on local government, and instead allowed local government the right to act within a reasonable time based upon the nature and the scope of the request.[31]

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[31] 47 U.S.C. § 332(7)(B)(ii).

4. A "shot clock" will harm the public.

Rushing through the application process in order to comply with the proposed deadlines can harm the public. With the clock ticking, some municipalities may prematurely approve the tower request. In this situation, the government puts the request of the applicant before the concerns of the public—at the risk of harming the public.

In addition, time may run out, and the request will then be deemed automatically approved. Government approval or automatic approval could occur before the local zoning authority receives all relevant facts and commentary from the community, consultants, or other persons so that it can may an informed decision.

Once the tower is approved (by the government or by automatic approval) and then constructed, it may be too late for the local zoning authority to take corrective action—if it is later discovered that the tower is unsafe or harmful to the public.

5. A "shot clock" may increase litigation and other costs.

In contrast to the above observation, with time running out, some municipalities may choose to deny the tower siting request. In this case, the government puts the concerns of the public before the request of the applicant—at the risk of being sued by the applicant.

Thus, if a municipality has not completed the review process, it may feel compelled to deny the request, rather than risk having an unsafe tower be automatically approved. Such denials will surely result in litigation by applicants whose requests have been denied.

In any event, prematurely granting or denying the request under the pressure of the shot clock running out will have adverse consequences. Local government should have a reasonable time to act upon a request—as Congress intended—and not be placed in a precarious position of hastily making an uninformed decision.

6. The proposed rules are not necessary.

CTIA has not produced sufficient evidence to justify the alleged need for its proposed rules. There is no proof that local government have been unreasonably delaying the local zoning process. However, there is evidence that tower siting requests are being processed in a reasonable time.[32] Therefore, the proposed rules are not necessary, and the FCC should not take any action—other than deny CTIA's Petition.

Conclusion

The FCC should *not* adopt the rules being proposed by CTIA, which would significantly hinder the local zoning authority.

The proposed rules are contrary to Congress' intent, as Congress has specifically preserved local zoning authority. Thus, legally, the FCC does not have the authority to preempt local zoning laws nor does the FCC have the authority to re-write the Telecommunications Act by (1) substituting Congress' reasonableness test with specific deadlines for approving tower siting requests, (2) by declaring that the use of variances are

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[32] See Opposition of City of Los Angeles, *et al.* ("Coalition for Local Zoning Authority").

prohibited, or (3) by declaring what constitutes the prohibition of providing telecommunications service.

Further, Congress did not intend a "one size fits all approach" with respect to tower siting. Given that each situation is different, Congress intended for local zoning authorities to have flexibility when establishing rules concerning tower placement. Thus, a practical matter, the FCC should not impose specific deadlines for approving tower siting requests, eliminating the use of variances, or prohibiting certain decisions by local zoning authorities.

Respectfully Submitted:

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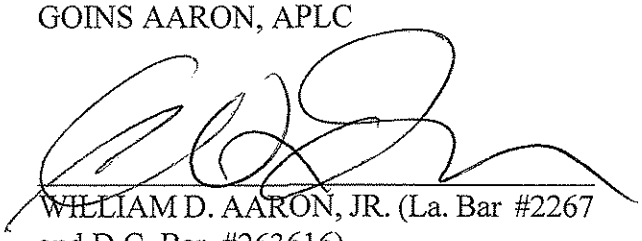

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